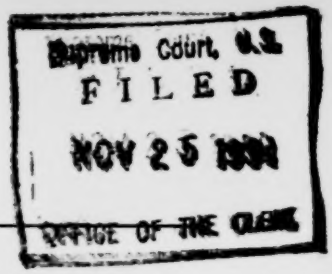
91-888



No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1991.

UNITED STATES OF AMERICA,
Respondent,

v.

RUSSELL A. WERME,
Petitioner.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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November, 1991

QUESTION PRESENTED FOR REVIEW

Did the District Court err in not dismissing Count One of the Indictment for failure to state an offense against the United States of America, where Count One attempted to allege a conspiracy (18 U.S.C. s 371) to violate the Travel Act (18 U.S.C. § 1952(a)(3)), but was devoid of any allegations containing any elements or charging language of the Travel Act, including the required "unlawful activity" under 18 U.S.C. § 1952(b)?

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Court of Appeals below (Pet. App. 1) is reported in 939 F.2d 108 (3rd Cir. 1991). The Memorandum and Order dated December 26, 1989 of the District Court below (Pet. App. 23) was not reported.

JURISDICTION

The judgment of the Court below (Pet. App. 45) was entered on July 30, 1991. Petitioner's Petition for Rehearing was filed on or about August 15, 1991. The order of the Court below denying Petitioner's Petition for Rehearing was entered on August 27, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Fifth Amendment to the U.S. Constitution provides in pertinent part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, ...

U.S. Const. amend. V.

2. The Sixth Amendment to the U.S. Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause

of the accusation; ...

U.S. Const. amend. VI.

3. One of the statutes under which Petitioner was prosecuted, 18 U.S.C. § 371, provides as follows:

> § 371. *Conspiracy to commit offense or to defraud United States.*
>
> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 U.S.C. § 371 (1948).

4. The federal offense which the Petitioner was alleged to have conspired to violate was 18 U.S.C. § 1952(a)(3). The relevant text of 18 U.S.C. § 1952 provides as follows:

§ 1952. *Interstate and foreign or transportation in aid of racketeering enterprises.*

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to --

***

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means

(1) any business enterprise involving gambling, liquor on which the federal excise tax has not been paid, narcotics or controlled substances (as defined in § 102(6) of the Controlled Substances Act, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States,

> (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States, or
>
> (3) any act which is indictable under subchapter II of Chapter 53 of Title 31, United States Code, or under Section 1956 or 1957 of this Title.

18 U.S.C. § 1952(a), (b) (1986).

5. The relevant test of the Pennsylvania commercial bribery statute referenced in Count Two of the Indictment against Petitioner provides as follows:

> § 4108. *Commercial bribery in breach of duty to act disinterestedly.*
>
> (a) Corrupt employe (sic), agent, or fiduciary. -
>
> A. An employe (sic), agent, or fiduciary commits a misdemeanor of the second degree when, without the consent of his employer or principal he solicits, accepts or agrees to accept any benefit from another person upon agreement or understanding that such benefit will influence his conduct in relation to the affairs of his employer or principal.
>
> ***

(c) Solicitation. -

A. A person commits a misdemeanor of the second degree if he confers, or offers or agrees to confer, any benefit the acceptance of which would be criminal under subsections (a) ... of this section.

18 Pa.Cons.Stat.Ann. § 4108 (1973).

STATEMENT OF THE CASE

The facts necessary to place in their setting the questions now raised can be briefly stated:

On April 5, 1989, a Grand Jury sitting in the Eastern District of Pennsylvania, returned a two count indictment, charging Petitioner Russell A. Werme in Count One with conspiracy to violate the Travel Act (18 U.S.C. § 371), and in Count Two with a substantive violation of the Travel Act (18 U.S.C. § 1952(a)(3)). A superseding indictment (hereinafter referred to as "Indictment") was returned on September 6, 1989 (Pet. App. 50), alleging the same offenses, and was docketed as Criminal No. 89-00132, entitled *United States of America v. Russell A. Werme and Eugene L. Brault.*

Petitioner timely filed extensive pretrial motions seeking, *inter alia*, to dismiss the Indictment for failure to state an offense. The District Court denied Petitioner's motion by Memorandum and Order dated December 26, 1989 (Pet. App. 23). On March 13,

1990, after a trial lasting approximately three weeks, Petitioner was found guilty by a jury on both counts of the Indictment.

On June 1, 1990, the District Court entered a Judgment of Acquittal in favor of Petitioner as to Count Two.

On June 21, 1990, the District Court entered its Judgment, and Petitioner was sentenced to three years imprisonment on Count One, the imposition of which sentence was suspended, and Petitioner was placed on probation for a period of five years, conditioned upon 300 hours of community service and a fine of $10,000 (Pet. App. 45). This judgment and sentence was affirmed by the Court of Appeals for the Third Circuit, *United States of America v. Russell A. Werme*, No. 90-1485, 939 F.2d 108 (1991), from which Petitioner now brings a Petition to this Court for a Writ of Certiorari.

EXISTENCE OF JURISDICTION BELOW

The District Court had jurisdiction over the proceedings below pursuant to 18 U.S.C. § 3231.

ARGUMENT

While the Third Circuit Court of Appeals correctly stated the overall legal criteria for determining the sufficiency of a conspiracy indictment, it disregarded its own and other Circuits' law governing the determination of how the legal criteria are met and, for the first time, upheld the validity of a conspiracy

indictment which alleged no elements of the underlying substantive offense.

In declining to dismiss Count One of the Indictment for failure to state an offense, the District Court and the Court of Appeals rendered decisions in conflict with the following well-settled rules of law, in the Third Circuit and other Circuits, governing the determination of the sufficiency of an indictment:

(1) language in so-called "overt acts" of a conspiracy indictment cannot be borrowed to supply an element which is missing from the charging language of a conspiracy indictment; and

(2) language may not be "borrowed" from other counts in an indictment to remedy a deficiency in the count under scrutiny unless specifically incorporated by reference to the other count.

I. The charging and the Plan and Purpose paragraphs of Count One of the Indictment did not contain the elements of the offense of conspiracy to violate the Travel Act, and failed to sufficiently apprise Petitioner of the charge against him, because Count One alleges no elements of the Travel Act.

The Fifth Amendment to the Constitution provides, in part, that "no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury ...". U.S. Const. amend. V. Under the Sixth Amendment, an indictment is legally insufficient unless

an accused in a criminal prosecution is informed of the nature and cause of the accusation against him. *Bartelli v. United States*, 227 U.S. 427 (1913). Rule 7(c) of the Federal Rules of Criminal Procedure, requires that an indictment provide "a plain, concise and definite written statement of the essential facts constituting the offense charged". Fed.R.Crim.P. 7(c). Thus, where an indictment fails to state an offense against the laws of the United States, the indictment fails to meet the requirements of Rule 7(c), and there then exists no valid indictment. If the District Court fails to dismiss the indictment, the defendant is thereafter "held to answer" for a crime in the absence of a valid indictment, in violation of the Fifth Amendment and the Sixth Amendment. More importantly, the failure of an indictment to state an offense against the laws of the United States deprives the District Court of its jurisdiction, as the District Court's jurisdiction under 18 U.S.C. § 3231 is limited to "offenses against the United States". 18 U.S.C. § 3231 (1948). The sufficiency of an indictment is measured by two criteria: (1) whether it contains the elements of the offense charged and sufficiently apprises the defendant of what he must be prepared to meet, and (2) whether it is specific enough to make a double jeopardy claim possible. *Russell v. United States*, 369 U.S. 749 (1962); *Hamling v. United States*, 418 U.S. 87 (1974); *United States v. Wander*, 601 F.2d 1251, 1258 (3rd Cir. 1979).

The gravamen of a charge under the Travel Act is use of an interstate facility with intent to violate certain federal or state laws. *United States v. Gordon*, 641 F.2d 1281, 1284 n. 6 (9th Cir.), *cert. denied*, 385

U.S. 815 (1966). "In a prosecution for conspiracy to violate the Travel Act, it is required that the aim of the conspiracy be an 'unlawful activity' *within the special definitional requirements of § 1952(b)*" (emphasis added). *United States v. Slawik*, 408 F.Supp. 190, 200 (D.Del. 1976), *aff'd*, 564 F.2d 90 (3rd Cir. 1977).

A. No allegation of interstate travel or use of interstate facilities.

To determine whether Count One of the Indictment (Pet.App. 50) states an offense, the charging and Plan and Purpose portions must be scrutinized, which consisted only of the following paragraphs:

> 8. Beginning at a time unknown to the grand jury but continuing from at least January 1983 to and including April 19, 1984, in the Eastern District of Pennsylvania and elsewhere, the defendants,
>
> RUSSELL A. WERME and
> EUGENE A. BRAULT,
>
> together with Timothy W. McCuen and other persons known and unknown to the grand jury, did conspire, combine, confederate and agreed to violate Title 18, United States Code, Section 1952(a)(3).
>
> PLAN AND PURPOSE OF THE CONSPIRACY
>
> 9. It was the plan and purpose of the

conspiracy that defendants RUSSELL A. WERME and EUGENE L. BRAULT on behalf of B&B, would and did obtain copies of bids containing confidential information, received by United Engineers from the competitors of B&B on the Seabrook contract. Defendants RUSSELL A. WERME and EUGENE L. BRAULT would and did obtain copies of bids received by United Engineers from the competitors of B&B prior to the time B&B actually submitted its bid to United Engineers.

10. It was further the plan and purpose of the conspiracy that defendants RUSSELL A. WERME and EUGENE L. BRAULT would and did confer on Timothy W. McCuen, money and other things of value in exchange for copies of the bids received from competitors of B&B by United Engineers for the Seabrook contract.

11. It was further the plan and purpose of the conspiracy that defendants RUSSELL A. WERME and EUGENE L. BRAULT on behalf of B&B, would and did review and utilize the confidential information contained in the bids received from the competitors of B&B by United Engineers in preparing the bid to be submitted to United Engineers by B&B, thereby assuring that B&B would submit the lowest bid for the Seabrook contract and unlawfully receive the

Seabrook contract from United Engineers.

The language in the charging and Plan and Purpose paragraphs of Count One contains *no* reference to use of interstate facilities or interstate travel. There is no "plain" or "definite" statement of this essential component of the conspiracy charge, not even a suggestion or a hint as to what interstate facility the defendant is alleged to have conspired to use or what interstate travel he conspired to cause. When an element of the underlying offense affects a substantial right and where specification of that element is necessary to establish the illegality of the behavior or the court's jurisdiction, it constitutes an essential part of an indictment. *See United States v. Hooker*, 841 F.2d 1225, 1229-30 (4th Cir. 1988). Without an interstate travel element, there is no federal jurisdiction and the conspiracy is not a conspiracy to violate a federal law.

The absence of any mention of interstate travel or use of interstate facilities in the charging and Plan and Purpose language of Count One is a fatal defect in a Travel Act conspiracy case. Did the Grand Jury intend to charge conspiracy to travel, conspiracy to use facilities of interstate commerce, neither of these activities, or both? Interstate activity is the linchpin of the Travel Act and the basis of federal jurisdiction over the illegal activity under state law that it prohibits. *Id.* at 1227-1229. At an absolute minimum, a conspiracy count must at least allege an agreement and specific intent to commit an unlawful act. *Wander,* 601 F.2d at 1259. A Travel Act conspiracy condemns an agreement to travel interstate or use an interstate facility with

intent to promote specified unlawful activity, 18 U.S.C. § 1952(a)(3) (1986), and not merely the unlawful activity allegedly being carried on through the interstate travel.

B. Absence of any alleged specific unlawful acts.

In addition to the absence of any reference to interstate facilities or travel, the pertinent paragraphs of Count One fail to describe any specific unlawful acts. The Plan and Purpose paragraphs (paragraphs 9, 10, and 11), allege the receipt and use of bid information to obtain contracts and the conferring of money and other things of value on McCuen in exchange for the bids. None of these activities is described as unlawful in these paragraphs. In fact, the only place where the word "unlawfully" appears is in paragraph 11 as a modifier describing the receipt of the contract by B&B Insulation, Inc. However, alleged unlawful receipt of a contract does not constitute one of the unlawful activities included within the ambit of the Travel Act, 18 U.S.C. § 1952(b)(2) (1986).

The underlying unlawful activity need not be described with great particularity. However, in this case, the applicable indictment language describes conduct that is not, per se, unlawful, there is no characterization of it as unlawful, and no specific state statute is mentioned or identified. The actions alleged in the Plan and Purpose paragraphs do not constitute commercial bribery under Pennsylvania state law. *See* 18 Pa.Cons.Stat.Ann § 4108 (1983). In short, the type

of illegal activity which the defendant is alleged to have conspired to commit is not made clear. Count One is neither "plain" nor "definite". Fed.R.Crim.P. 7(c)(1). It is flagrantly poor draftsmanship, well below the standard this Court should consider acceptable for government pleadings in criminal cases where defendants are entitled to clarity and specificity in the charges brought against them.

II. The lower court, while correctly stating the law concerning standards for determining sufficiency of a conspiracy indictment, reached its result by ignoring other judicial rules of construction.

In its opinion, the Third Circuit correctly stated that in reviewing the sufficiency of the Indictment, a *de novo* determination is made whether the Indictment contains each element of the offense charged, sufficiently apprises the defendant of the crime he should be prepared to meet, and whether the Indictment is specific enough to make a plea of double jeopardy possible. *United States v. Werme*, 939 F.2d 108, 112 (3rd Cir. 1991). The opinion goes on to correctly point out that a conspiracy indictment need not allege all of the elements of the offense which the defendants are conspiring to commit, because in a conspiracy count the conspiracy is the gist of the offense and, while the indictment must allege every element of the crime of conspiracy, it need not plead every element of the substantive offense, but must put the defendants on notice that they are being charged with a conspiracy to commit the underlying substantive offense. *Id.* at 112, *citing United States v. Knox Coal*

Co., 347 F.2d 33 (3rd Cir.), *cert. denied*, 382 U.S. 904 (1965).

The Court held that some elements of the underlying offense must be pled, and that if the charging language had simply alleged that Werme "conspired to violate 18 U.S.C. § 1952(a)(3) that it would be legally insufficient". *Id.* at 112 n. 1. In the same footnote, the Court states "This problem, however, does not exist in this case; for the paragraphs set forth in the Plan and Purpose section of the conspiracy count (which are considered part of the 'charging language,' *see supra* at 111) clearly reveal that Werme is charged with conspiracy to promote *commercial bribery* through interstate activity (*see supra* at 112)" (emphasis added). *Id.* at 112 n. 1. As mentioned above, however, the charging language in the subject indictment nowhere mentions the words "bribe", "commercial bribery", "interstate", "travel", or "use of interstate facilities". The footnote fails to explain how the Plan and Purpose section of the conspiracy count "clearly reveal" conspiracy to promote commercial bribery through interstate activity. The footnote fails to explain how conspiracy involving interstate activity is alleged, where no words connotating interstate activity are present. Although language present in paragraphs 8-11 of the Indictment might suggest bribery, the language also suggests bid rigging (e.g., "unlawfully obtain the Seabrook project" as contained in paragraph 11). There is no citation in Count One to any commercial bribery statute, and in any event, the elements of the Pennsylvania commercial bribery statute are quite different from the language employed in the

Indictment.

From the foregoing, it is apparent that the so-called "charging language" of the Indictment does not "clearly reveal" anything, and gives no support to the legal analysis conducted by the Court. Since the Court expressly found no comfort in the citation to 18 U.S.C. § 1952(a)(3), how did the Court reach the result it reached? The only way the Court of Appeals could have reached this result was either by transferring allegations of travel and/or use of Western Union from the Overt Acts into the charging portion of the Indictment, or by incorporating allegations of travel and commercial bribery from Count Two of the Indictment. As will be seen below, no Court of Appeals has approved the former technique and only one circuit has approved the latter technique, in a circumstance quite distinguishable from the case at bar.

In scrutinizing the sufficiency of a conspiracy count, two Circuits have held that allegations contained under the heading of overt acts in that count may not be used to remedy any insufficiency in the charging section of a conspiracy count. Overt acts are acts in furtherance of a conspiracy and are not necessarily the subject or object of the illegal agreement. *Wander, supra,* 601 F.2d at 1259; *Knox Coal Co., supra*, 347 F.2d at 38; *United States v. Pheaster*, 544 F.2d 353, 361 (9th Cir. 1976), *cert. denied*, 429 U.S. 1099 (1977). No cases holding to the contrary have been found. Similarly, the technique of incorporation of allegations in other counts in a multi-count indictment to remedy a deficiency in the count under scrutiny, absent a specific incorporation

by reference, has been rejected by the Second, Fourth, Fifth, Ninth and Tenth Circuits. *United States v. McGuire*, 381 F.2d 306, 319 (2nd Cir. 1967), *cert. denied*, 389 U.S. 1053 (1968); *Hooker, supra, 841 F.2d at 231; United States v. Hajecate*, 683 F.2d 894, 901 (5th Cir. 1982), *cert. denied,* 461 U.S. 927 (1983); *Davis v. United States,* 357 F.2d 438, 440 & n. 2 (5th Cir.), *cert. denied,* 385 U.S. 927 (1966); *Walker v. United States*, 176 F.2d 796, 798 (9th Cir. 1949); *McClintock v. United States*, 60 F.2d 839, 840 (10th Cir. 1932). To hold otherwise would allow courts to merely guess what a Grand Jury intended.

In *United States v. Esposito*, 771 F.2d 283 (7th Cir. 1985), *cert. denied*, 475 U.S. 1011 (1986), the Seventh Circuit used allegations from other counts in an indictment to cure defects in other counts, but under very limited circumstances.[1] In that case, four travel act counts of the indictment failed to allege that, after travelling, the defendants performed a specific unlawful act of extortion. However, the defendants were also charged with violations of the Hobbs Act, i.e., affecting commerce by extortion, and the extortion alleged in the Hobbs Act counts specifically correlated to the extortion acts not alleged in the Travel Act counts. The Travel Act counts were upheld by the Seventh Circuit as providing adequate notice by a reading of the

---

[1] **Prior to the Seventh Circuit's holding in *Esposito*, the Seventh Circuit was totally aligned with holdings on this point in all of the other Circuits. *See United States v. Gordon*, 253 F.2d 177, 180 (7th Cir. 1958).**

indictment as a whole, because the missing elements were necessarily contained in the Hobbs Act counts. *Id.* at 288.

The holding in *Esposito* is readily distinguishable from the case at bar. In *Esposito*, the indictment was only attacked on appeal, and no lack of notice was complained of below. In the case at bar, the Indictment was attacked at every stage of the proceeding; actual harm due to lack of notice was asserted prior to trial, during trial and, of course, thereafter. Where the question of insufficiency is first raised on appeal, the courts tend to impose a stricter standard upon the defendant. *Hagner v. United States*, 285 U.S. 427 (1932); *United States v. Wabaunsee*, 528 F.2d 1 (7th Cir. 1975); *Finn v. United States*, 256 F.2d 304 (4th Cir. 1956); *Hooker, supra*, 841 F.2d at 1229.

The analysis conducted by the Court in *Esposito, supra*, is unavailing in the case at bar, because a review of the overt acts in the conspiracy count and the allegations in Count Two do not, unlike *Esposito*, compel a particular result. Based upon the Overt Acts in Count One and the language of Count Two, the missing interstate element could be conspiracy to travel, conspiracy to use interstate facilities, or conspiracy to do both. Where the language in the other counts does not necessarily establish the identity of the particular missing element, the analysis constitutes mere guesswork as to the Grand Jury's intent. Thus, even *Esposito* does not stand for the proposition that the Indictment is valid. *Esposito, supra*, at 289.

The case at bar is absolutely indistinguishable from *Hooker, supra*, where an indictment charging conspiracy to violate 18 U.S.C. § 1962(c) was struck down for failing to alleged the essential element of an effect on interstate commerce. The only way it can be distinguished is to improperly indulge in the "borrowing" of language elsewhere in the Indictment to remedy defects in the charging paragraphs of Count One. This practice, as seen above, which has never been utilized heretofore to sustain an indictment which was duly objected to prior to trial. Since the Court of Appeals of necessity had to find missing language elsewhere to reach the result it reached, its holding in the case at bar cannot be reconciled with decisional law in the Third Circuit or any other Circuit.

CONCLUSION

The District Court's Order denying Petitioner's Motion in Arrest of Judgment, and the judgment of the court of appeals affirming the District Court's Judgment, should be reversed, as Count One of the Indictment fails to state an offense against the United States of America.

Respectfully submitted,

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91-888

(2)

No. _____

Supreme Court, U.S.
FILED
NOV 25 1991
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1991.

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ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
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APPENDIX

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November, 1991

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Filed July 30, 1991

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 90-1485

UNITED STATES OF AMERICA

V.

RUSSELL A. WERME,

Appellant

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE EASTERN
DISTRICT OF PENNSYLVANIA
(D.C. Criminal Action No. 89-00132-01)

Argued November 30, 1990

BEFORE: BECKER, NYGAARD and ALITO,
Circuit Judges

(Opinion Filed July 30, 1991)

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OPINION OF THE COURT

NYGAARD, *Circuit Judge.*

A jury found Russell Werme guilty of conspiracy to violate the Travel Act, 18 U.S.C. §§ 371, 1952(a)(3). Werme's conviction was based on bribes he and Eugene Brault paid when they ran and managed B & B Insulation Company. We have jurisdiction pursuant to 28 U.S.C. § 1291. We will affirm.

I.

FACTS AND PROCEDURE

United Engineers and Constructors ("United") was the primary contractor on the Seabrook Nuclear Power Plant construction project in Seabrook, New Hampshire. B & B, a subsidiary of Insulco, Inc., desired to participate in the Seabrook project as a subcontractor. Werme, then President of Insulco, Inc. learned that B & B was not on the qualified subcontractor/bidder's list. Werme sent two B & B salesmen to meet with

Timothy McCuen, United's Chief Buyer, to remedy this situation. The B & B salesmen's efforts failed because McCuen said he wanted to meet with a higher level B & B employee.

McCuen was dishonest. While employed by United, he accepted bribes in exchange for confidential bid information. McCuen was charged with bribery in 1981, but negotiated a plea and began cooperating with the federal government in its bribery and kickback investigations. McCuen did not, however, tell the FBI about bribes he accepted in connection with the Seabrook contract. When these bribes were discovered, Ronald Mizzau, United's buyer on the Seabrook project, pleaded guilty to aiding and abetting McCuen in his bribery scheme on Seabrook. McCuen was then also charged with taking bribes, entered into a second agreement, and pleaded guilty to bribery. The details regarding McCuen's receipt of bribes on the Seabrook progress are as follows.

In 1982, Frank Farese, a B & B consultant acquainted with McCuen, arranged a meeting between Werme and McCuen to discuss selling Seabrook bid information to Werme. At a January 1983 meeting in Philadelphia, Werme paid McCuen $2000: the first of several bribes for confidential bidding information.

In April 1983, Werme used Farese as a messenger to give McCuen $4000 for access to competing Seabrook bids. Werme called defendant Eugene Brault, the sales manager of B & B, in Houston, and Brault flew from Texas to Philadelphia, where both men allegedly examined the competing bids before B & B submitted its proposal.

In August 1983, United sought clarification of subcontractors' bids. Again, Werme made arrangements with McCuen to preview competing bids. This time, McCuen received free use of a rental car as payment. In return, he left Werme copies of the competing bids in a hotel room. In September 1983, Brault and Werme's secretary travelled to Philadelphia to prepare B & B's bid and to view confidential bid information.

In April 1984, when United solicited a re-bid on the Seabrook contract, Werme and Brault once again arranged to pay McCuen $3000 for confidential bid information. The day the re-bids were due, Brault paid $3,000 to McCuen in Philadelphia. As before, McCuen left copies of competing bids at a hotel where Brault retrieved them.

Werme and Brault were indicted and each charged with: (1) one count of conspiracy to violate the Travel Act, 18 U.S.C. § 371; and (2) one count of violating the Travel Act, 18 U.S.C. § 1952(a)(3). A jury found Werme guilty of both counts, and Brault guilty of the Travel Act violation but acquitted him of conspiracy.

The district court granted Brault's and Werme's motion for judgment of acquittal on the Travel Act violation, finding that the special verdict did not set forth a theory upon which they could be found guilty. The court denied Werme's motion to acquit him of conspiracy. The district court sentenced Werme to a suspended three-year prison term and placed him on probation for five years, during which he must perform 300 hours of community service.

II.

ISSUES

Werme makes three allegations of error. First, he challenges the sufficiency of the conspiracy count of the indictment, claiming it did not contain all elements of the underlying Travel Act offense and, consequently, neither put him on notice of the charges against him nor afforded him double jeopardy protection. Second, Werme claims the district court erred by failing to give the jury a cautionary instruction he requested after the government used McCuen's and Mizzau's guilty pleas in its case against him and by allowing the government to inquire whether McCuen ever had been charged with extortion. Third, Werme claims the district court erred by allowing the prosecutor to argue to the jury, without supporting evidence, that Werme paid a bribe in September 1983.

We conclude that the conspiracy count of the indictment was legally sufficient, and that the district court did not err by allowing the prosecutor to argue the September 1983 bribe to the jury. We also conclude that it was harmless error to introduce the guilty pleas of McCuen and Mizzau and to allow the inquiry concerning whether McCuen had been charged with extortion. Thus, we will affirm.

III.

SUFFICIENCY OF THE INDICTMENT

Generally, each count of the indictment must set forth a sufficient description of the crime charged. The charging portion of a conspiracy count includes all paragraphs within that count except

for allegations under the overt acts heading, unless those allegations are expressly incorporated by reference. *Joplin Mercantile Co. v. United States*, 236 U.S. 531, 535-36 (1915); *United States v. Knox Coal Co.*, 347 F.2d 33, 38 (3d Cir.), *cert. denied*, 382 U.S. 904 (1965). In addition, the charging portion of a conspiracy count may not rely upon other counts within the indictment to cure deficiencies, unless those counts too are expressly incorporated by reference. *See, e.g., United States v. Scanzello*, 832 F.2d 18, 23 (3d Cir. 1987).

The charging portion of this conspiracy count alleges that Werme and Brault, along with others, "did conspire, combine, confederate and agreed to violate Title 18, United States Code, Section 1952(a)(3)." It further alleges that the purpose of the alleged conspiracy was to obtain confidential bid information in exchange for money or "other things of value." Finally, the charging portion alleges that the conspiracy's purpose was implemented through overt acts of bribery.

When reviewing the sufficiency of the indictment, we look at the entire indictment and determine de novo:

> (1) whether the indictment contains the elements of the offense intended to be charged and sufficiently appraises the defendant of [the crime] he should be prepared to meet;
>
> (2) whether the indictment is specific enough to make a plea of double jeopardy possible.

United States v. Wander, 601 F.2d 1251, 1258 (3d Cir. 1979) (citations omitted). *See also United States v. Sebetich*, 776 F.2d 412, 426 (3d Cir.

1985), *reh'g denied*, 828 F.2d 1020 (1987), *cert. denied*, 484 U.S. 1017 (1988).

An indictment charging a conspiracy under 18 U.S.C. § 371 need not specifically plead all of the elements of the underlying substantive offense. *Wander*, 601 F.2d at 1259 ("Conspiracy indictments need not allege all of the elements of the offense which the defendants are accused of conspiring to commit.") (citation omitted); *United States v. Knox Coal Co.*, 347 F.2d 33, 38 (3d Cir. 1965). Rather, "[i]n a conspiracy count, the conspiracy is the gist of the offense...[and the indictment] need not plead the substantive offense letter-perfect because the purpose of the conspiracy may have been accomplished even though such activity fell short of completing a substantive offense." *Knox Coal Co.*, 347 F.2d at 38 (citation omitted). *See also Williamson v. United States*, 207 U.S. 425, 447 (1908) (Where the indictment alleges a conspiracy, "certainty, to a common intent, sufficient to identify the offense which the defendants conspired to commit, is all that is required in stating the object of the conspiracy."). To be legally sufficient, a conspiracy count in an indictment need only set forth "the agreement and specific intent to commit an unlawful act, and when required by statute, an overt act." *Wander*, 601 F.2d at 1259. A conspiracy indictment need not allege every element of the underlying offense, but need only put defendants on notice that they are being charged with a

conspiracy to violate the underlying substantive offense.[1]

In *Wander*, the defendants were charged with a conspiracy to violate the Travel Act. The defendants challenged the conspiracy count on sufficiency grounds, claiming that it failed to allege an unlawful act after the interstate travel. We disagreed, holding that the omission did not

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1. Although *Wander* provides that "[c]onspiracy indictments need not allege *all* of the elements of the offense which the defendants are accused of conspiring to commit," 601 F.2d at 1259 (emphasis added), we do not read it as also providing that a conspiracy indictment need not allege *any* of the elements of the underlying offense. If the charging language in this case simply had alleged that Werme conspired to violate "18 U.S.C. § 1952(a)(3)," we think that it would have been legally insufficient. It is well settled that an omission in the charging language of an indictment cannot be cured by a mere statutory citation. *See, e.g., United States v. Beard*, 414 F.2d 1014, 1015 (3d Cir. 1969) (citation to 18 U.S.C. § 2314 in indictment did not remedy failure to allege "unlawful or fraudulent intent"); *United States v. Zangger*, 848 F.2d 923, 925 (8th Cir. 1988) ("If an essential element of the charge has been omitted from the indictment, the omission is not cured by the bare citation of the charging statute."). Reliance on a bare statutory citation is particularly problematic when the underlying offense is an alleged violation of the Travel Act, because 18 U.S.C. § 1952(b) lists as "unlawful activity" a variety of criminal conduct, including extortion, bribery, and arson. Absent further detail, therefore, an indictment simply charging a conspiracy to violate "18 U.S.C. § 1952(a)(3)" would not indicate which "unlawful" activity the defendant conspired to promote through interstate activity. This problem, however, does not exist in this case; for the paragraphs set forth in the Plan and Purpose section of the conspiracy count (which are considered part of the "charging language," *see supra* at 5) clearly reveal that Werme is charged with conspiracy to promote *commercial bribery* through interstate activity (*see supra* at 6).

render the indictment fatally flawed. *Wander*, 601 F.2d at 1258-1259.

The conspiracy count of the indictment against Werme is sufficient and does not amount to "a deprivation of a significant protection of the indictment process." *Wander*, 601 F.2d at 1258. The conspiracy count, read together with the Plan and Purpose section of that count, sets out all three *Wander* elements by charging that Werme and Brault (i) "did conspire, combine, confederate and *agreed*" (ii) with the *intent* to violate the Travel Act, 18 U.S.C. § 1952(a)(3) and (iii) that the conspiracy involved the unlawful *act* of bribing McCuen.

In this case, the indictment satisfies the sufficiency requirement because it put Werme on notice that he was charged with a conspiracy to commit state law bribery through interstate travel or use of interstate facilities, a violation of 18 U.S.C. § 1952(a)(3).[2]

The conspiracy count of the indictment is also specific enough to provide the double jeopardy protection required by *Wander*. The count

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2. Werme relies on *United States v. Hooker*, 841 F.2d 1225, 1229-1230 (4th Cir. 1988). But *Hooker* is distinguishable. Hooker was charged with a conspiracy to violate 18 U.S.C. § 1962(c). He challenged the sufficiency of that indictment, arguing that the charge merely paraphrased the statute and failed to allege the essential element of an effect on interstate commerce. *Hooker*, 841 F.2d at 1227. The Court of Appeals found the indictment insufficient because "mere citation of the statute under which the indictment issues will [fail to] satisfy the requirement that the indictment contain a clear statement of the elements of the offense charged." *Hooker*, 841 F.2d at 1229-1230. Werme's case differs from *Hooker* because here the charging section goes on to describe the purpose of the conspiracy and overt acts in furtherance of that conspiracy.

describes a conspiracy "from at least January 1983 to and including April 19, 1984" in "the Eastern District of Pennsylvania and elsewhere," to obtain "bids containing confidential information" from competitors on the Seabrook project for "money and other things of value." App. at 13A-14A. This description is adequate to describe Werme's crime and to protect Werme from attempts to prosecute him again for the same conspiracy to bribe charged in this indictment. *Grady v. Corbin*, ___ U.S. ___, 110 S.Ct. 2084, 2087 (1990) (The double jeopardy clause bars subsequent prosecutions for conduct establishing an essential element of an offense for which the defendant has already been prosecuted.); *United States v. Esposito*, 912 F.2d 60, 64-65 (3d Cir. 1990), *cert. dismissed*, 111 S.Ct. 806 (1991).

IV.

GUILTY PLEA EVIDENCE

A.

Werme contends that the district court erred by admitting without a cautionary instruction evidence that McCuen and Mizzau, who allegedly participated in the same criminal conspiracy, had pleaded guilty to related offenses. Werme maintains that the government improperly introduced this evidence as substantive proof of his guilt. The government contends the evidence was proper because it bore on the witnesses' credibility and because McCuen's plea was relevant to rebut the defense claim that he was acting as a government agent. We hold that Werme's counsel did properly request a jury instruction as to the limited purposes for which

the evidence could be used, but that the failure to give such an instruction in this case was harmless error.

We have long recognized that evidence of another party's guilty plea is not admissible to prove the defendant's guilt. *See, e.g., United States v. Gambino*, 926 F.2d 1355, 1363 (3d Cir. 1991); *Bisaccia v. Attorney General of New Jersey*, 623 F.2d 307 (3d Cir.), *cert. denied*, 449 U.S. 1042 (1980); *United States v. Toner*, 173 F.2d 140 (3d Cir. 1949). As we recently noted in *Gambino*, however, evidence of a guilty plea or plea agreement may be introduced for other, permissible purposes. *Gambino*, 926 F.2d at 1363.

The most frequent purpose for introducing such evidence is to bring to the jury's attention facts bearing upon a witness's credibility. *See id.* Proof that a witness has pleaded guilty or has agreed to plead guilty is highly relevant to show bias, a recognized mode of impeachment. *United States v. Abel*, 469 U.S. 45, 49 (1985). The term "bias" is used "to describe the relationship between a party [in this case the prosecution] and a witness which might lead the witness to slant, unconsciously or otherwise, his testimony in favor of or against a party." *Id.* at 52. A witness who has pleaded guilty may have a tendency to favor the prosecution because of concern about the prosecution's position regarding sentence or for other reasons. "Proof of bias is almost always relevant" and, unlike "less favored forms of impeachment," may be shown by "extrinsic evidence." *Id.* Moreover, under Fed. R. Evid. 607, a witness may be impeached by any party, "including the party calling the witness." Thus, in *Gambino*, 926 F.2d at 1363, we wrote:

> In any criminal trial, the credibility of the prosecution's witnesses is central. By eliciting the witness' guilty plea on direct examination, the government dampens attacks on credibility, and forecloses any suggestion that it was concealing evidence. Such disclosure is appropriate.

Evidence of a guilty plea may be admissible for other permissible purposes in addition to impeachment. *See id.* Here, we agree with the government that evidence of McCuen's guilty plea was admissible to rebut the defense assertion that McCuen was acting as a government agent when he engaged in the activities that formed the basis for that plea. McCuen's willingness to plead guilty to a criminal charge based on these activities was relevant to show that he did not believe he was acting as a government agent.

While evidence of a guilty plea may be admissible for impeachment and other permissible purposes, the party against whom the evidence is offered is entitled to a limiting instruction upon request. Rule 105 of the Federal Rules of Evidence provides that: "[t]he court, upon request, *shall* restrict the evidence to its proper scope and instruct the jury accordingly" (emphasis added). Because evidence of a co-conspirator's guilty plea is extremely prejudicial to the defendant on trial absent such an instruction, compliance with the mandatory duty imposed by Rule 105 is particularly important. We conclude Werme properly objected to the admission of the guilty pleas and asked the district court to give a limiting instruction to the jury against using the pleas as substantive evidence of his guilt. The following

exchange between the court and Werme's counsel occurred in chambers:

> MR. PINSON: It's my understanding that while Mr. McCuen is on the stand, you're going to offer up some evidence of [McCuen's] conviction.
>
> * * * *
>
> MR. COSTELLO: Yes.
>
> MR. PINSON: Okay. Well, Your Honor, I don't intend to go into exactly what he pleaded guilty to other than the fact that it was a bribery transaction. And the only reason why I bring it up is that from this vast wealth of potential illegal transactions that Mr. McCuen could have entered a plea to, he entered a plea to the $3,000 that is the subject matter of this litigation. And I think if they introduce that specific conviction, *we're entitled to an instruction at a later time as far as the weight that should be given that.* I mean ordinarily they wouldn't be offering up that particular type of evidence. It would come in by way of impeachment.
>
> * * * *
>
> THE COURT: You mean the normal instruction regarding you should take into account the motivation of an individual who has been convicted and comes in and testifies or what?
>
> MR. PINSON: No. The fact that ...
>
> THE COURT: Or the actual—the nature of the conviction.
>
> MR. PINSON: Right. Yes, sir. *The fact that he entered a plea to a bribery transaction involving*

$3,000 cannot be used to infer that we were guilty of paying the bribe.

* * * *

MR. COSTELLO: Well, Your Honor, I can tell you right now. Basically at some point today, it'll happen today, I'll ask him did he plead guilty to any crimes and what were the crimes. And one of those crimes would be accepting the $3,000, which is the subject of this prosecution.

App. at 96a-100a (emphasis added).

It is clear that Werme took issue with the evidence and did indeed request a curative instruction. Under these circumstances, it was error for the court not to give one. *See United States v. Gullo*, 502 F.2d 759, 761 (3d Cir. 1974) ("[W]hile the evidence of a guilty plea by a co-conspirator is not admissible ... under some circumstances curative instructions are adequate to remove the harm" to defendant.) (citations omitted); *United States v. Restaino*, 369 F.2d 544, 545 (3d Cir. 1966) (When the trial court told the jury of co-defendants' guilty pleas, we found no error but admonished the trial court that "cautionary instructions should be given."); *Toner*, 173 F.2d at 142 ("The defendant had a right to have his guilt or innocence determined by the evidence presented against him, not by what has happened with regard to a criminal prosecution against someone else."); *Bisaccia v. Attorney General of the State of New Jersey*, 623 F.2d 307 (3d Cir.), *cert. denied*, 449 U.S. 1042 (1980). The next question before us is whether or not the error

is harmless.[3] We conclude that it is harmless error.[4]

In *Bisaccia*, we recognized that, under certain extreme circumstances, use of a co-conspirator's guilty plea could result in sufficient fundamental unfairness to give rise to a denial of due process. 623 F.2d at 313 ("Under the circumstances here, the admission of the co-defendant's guilty plea, the failure of the trial judge to give cautionary instructions to the jury about this evidence and the prosecutor's comments on this evidence so exceeded the tolerable level of ordinary trial error as to amount to a denial of constitutional due process."). Positing the *Bisaccia* panel's resolution of the issue before it — to wit, whether under the facts of that case the government's improper use

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3. We note that harmless error analysis is appropriate in this setting, since the error alleged is a "trial error," rather than a structural defect "affecting the framework within which the trial proceeds." *Arizona v. Fulminante*, 111 S.Ct. 1246, 1264-65 (1991).

4. Because of the great potential for unfairness resulting from the introduction of a co-conspirator's guilty plea, we urge the district courts not to leave resolution of objections thereto to the vagaries and pressures of trial but rather, in exercise of their case management prerogatives, to flush out such problems before trial. This can be done by encouraging counsel to file *in limine* motions and by holding hearings on such motions (or taking the matter up at pretrial or status conferences). *Inter alia*, the government can be called upon to state its proposed use of such evidence, and the defense can be called upon to state whether it proposes to impeach government witnesses on bias or credibility grounds by reference to the guilty plea. At such conferences or hearings, the precise nature of cautionary or jury instructions can be worked out, and hence not be forgotten in the exigencies of trial.

of a co-conspirator's guilty plea case was error of constitutional proportions and thus was cognizable in a federal habeas proceeding – we think that in non-extreme cases, such as this one, the government's use of such a plea without cautionary instructions constitutes non-constitutional, evidentiary error.

As a result, we are not required to determine whether the district court's erroneous admission of McCuen's and Mizzau's guilty pleas was harmless "beyond a reasonable doubt," *see Chapman v. California*, 386 U.S. 18, 24 (1967). To ascertain the harmlessness of the error, we instead must apply the "high probability" standard of appellate review set forth in *Government of Virgin Islands v. Toto*, 529 F.2d 278, 284 (3d Cir. 1976). Under *Toto*, errors in a criminal case are harmless if it is "highly probable" that they did not affect a party's substantial rights. *McQueeney v. Wilmington Trust Co.*, 779 F.2d 916, 924 (3d Cir. 1985). "'High probability' requires that the court have a 'sure conviction that the error did not prejudice the defendant,' but need not disprove every 'reasonable possibility' of prejudice." *United States v. Grayson*, 795 F.2d 278, 290 (3d Cir. 1986) (quoting *United States v. Jannotti*, 729 F.2d 213, 219-20 & n.2 (3d Cir. 1984)).

We conclude that it is "highly probable" that admitting McCuen's and Mizzau's guilty pleas did not contribute to the jury's verdict. The evidence against Werme was overwhelming. In addition to the testimony of McCuen and Farese detailing the scheme and Werme's involvement in it, the government introduced transcripts of a conversation between Farese and Werme that took

place on May 22, 1984. Farese was wearing a body wire and recorded the following exchanges:

WERME: And uh, (pause) yeah uh, I wanna, I wanna see the bids.

FARESE: Tell him your gonna have the money up there one way or another.

WERME: Um hum.

FARESE: Gene [Brault] will have it.

WERME: Um hum.

FARESE: Okay, I'll do that.

WERME: Thanks partner.

App. at 181a.

Other portions of this recording introduced at trial included Werme and Farese adding up the various payments made to McCuen, App. at 184A-185A, and a conversation in which Werme rationalized his actions:

WERME: And I'd say that, I'd guarantee I'd say that in court, I'd say that's ah compare prices, is the client gettin', gettin' an equal product? Yes. Is he getting it at the cheaper price than anybody else. Yes. And I believe that totally. It's not a deal of sayin' hey, I'mma pay you twenty five thousand dollars and well, throw these other suckers out and add five hundred thousand...

FARESE: Yeah...

WERME: or million dollars to my contract, it ain't the deal.

* * *

So I don't have to apologize.

App. at 187a-188a.

In light of the more substantial and direct evidence against Werme, we have a "sure conviction" that the evidence that McCuen and Mizzau had pleaded guilty to related offenses did not prejudice Werme, and admitting it without a curative instruction was harmless error.

B.

On direct examination, the prosecutor asked McCuen if he was "ever charged with extortion." This question was obviously designed to contradict Werme's assertion that he was a victim of McCuen's extortion. In other words, the prosecutor sought to have the jury infer that because McCuen was not charged with extortion, no extortion took place. Werme, in response to the question, immediately moved for a mistrial, but the judge refused his motion. We think that the prosecutor's question was improper. To rebut Werme's defense of extortion, the government was free to ask McCuen whether he had ever threatened anybody, but we think that the district court erred in allowing the prosecutor to inquire whether McCuen had been *charged* with extortion.

As we have explained above, the rule that a defendant is entitled to have the question of his guilt determined upon the evidence against him, not on whether someone else has been convicted of the same charge, is founded upon the notion

that another person's guilty plea or conviction with respect to similar or identical charges has only slight probative value on the question of the defendant's guilt, but is extremely prejudicial. *See Gambino*, 926 F.2d at 1363. Whether a witness was *charged* with a related offense is even less probative of guilt than a witness's conviction, yet it carries the same potential for extreme prejudice.

A number of factors may affect the government's charging decision. In this case, we cannot be sure why the government only charged McCuen with bribery, rather than extortion or both. Suffice it to say that the government's decision not to charge McCuen with extortion has only slight probative value on the question whether extortion actually occurred in this case. Yet presenting this evidence to the jury could have prejudiced Werme's extortion defense, particularly in view of the district court's failure to instruct the jury regarding the relevance, if any, of the government's charging decision.

Although we find the district court erred by admitting the question about whether McCuen was charged with extortion, we are satisfied that the error was harmless. Fed. R. Crim. P. 52(a). More precisely, we conclude that it is "highly probable," given the very strong evidence against Werme, *see supra* slip op. at pp. 15-16, that the error did not contribute to the jury's verdict. *Toto*, 529 F.2d at 284.

V.

THE SEPTEMBER 1983 BRIBE

Werme contends that the district court erred by allowing the prosecutor to ask him on

cross-examination whether a bribe was paid in September 1983. Werme further contends that the prosecutor improperly argued the existence of a September 1983 bribe to the jury in his summation.

The scope of cross-examination is left to the sound discretion of the trial court, and this court will reverse only for an abuse of that discretion. *United States v. Reed*, 724 F.2d 677, 679 (3d Cir. 1984). In this case, Werme contends that the prosecution had no good faith basis for asking on cross-examination about a bribe in September 1983. We disagree. Evidence was submitted that Brault had made a trip to Philadelphia in September 1983 to view confidential bid information. In addition, there was a transcript of an April 18, 1984 tape recorded conversation between Werme and Farese in which Werme referred to a payment made "last time." The "last time" Brault or Werme received confidential information was September 1983. Finally, in another recorded conversation, Werme reviews the payments made to McCuen and asks "[w]asn't there one other one in there?" This evidence provides a sufficient good faith basis for the prosecution's cross-examination of Werme about a September 1983 bribe.[5]

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5. In like manner, we reject Werme's contention that the evidence about the September 1983 bribe violated Fed. R. Evid. 404(b). "In the Rule 404(b) context, similar act evidence is relevant only if the jury can reasonably conclude that the act occurred and the defendant was the actor." *Huddleston v. United States*, 485 U.S. 681, 108 S.Ct. 1496, 1501 (1988). On this record, we conclude that a jury could reasonably conclude that a bribe was made in September 1983 and that Werme was involved in making the bribe.

Before closing arguments, Werme sought to prevent the prosecutor from referring to a September 1983 bribe in summation. The district court initially was inclined to prohibit comment on the bribe, but later concluded that the prosecutor could argue the reasonable inference of the bribe, but could not argue the amount of the bribe.

The prosecutor is entitled to considerable latitude in summation to argue the evidence and any reasonable inferences that can be drawn from that evidence. *United States v. Scarfo*, 685 F.2d 842, 849 (3d Cir. 1982). In *Scarfo*, we noted that "the appropriate inquiry is whether such remarks, in the context of the entire trial, were sufficiently prejudicial to violate the defendant's due process rights." *Id.* The prosecutor offered an inference of a bribe based upon the recorded conversations, Brault's trip to Philadelphia to obtain confidential information in September 1983, and the pattern of bribes being made whenever confidential information was received. In this case, we cannot say that the prosecutor's comment on the inference that a bribe was made in September 1983 was so prejudicial as to violate Werme's due process rights.

VI.

CONCLUSION

The conspiracy count of this indictment is sufficient because it sets forth the essential elements under 18 U.S.C. § 371, puts Werme on notice that he is being charged with a conspiracy to violate the Travel Act, 18 U.S.C. § 1952(a)(3), and allows him to plead his conviction as a bar to future prosecution. The district court committed

a harmless error by admitting the guilty pleas of McCuen and Mizzau into evidence and by allowing the prosecutor to inquire whether McCuen had been charged with extortion. Finally, the district court did not err by allowing the prosecutor to argue the September 1983 bribe to the jury. For the foregoing reasons, we will affirm Werme's conviction for conspiring to violate the Travel Act.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
v.	:	
RUSSELL A. WERME	:	
EUGENE L. BRAULT	:	NO. 89-132

MEMORANDUM AND ORDER

HUTTON, J. December 26, 1989

Presently before the Court are:

1. Defendant Werme's Motion to Dismiss the Indictment;

2. the Government's response thereto;

3. Defendant Brault's Supplemental Memorandum of Law Supporting Defendant Werme's Motion to Dismiss the Indictment;

4. Defendant Brault's Submission of Additional Legal Authority in Support of Defendant's Motion to Dismiss the Indictment for Failure to State an Offense;

5. Defendant Werme's Supplemental Memorandum in Support of Motion to Dismiss Counts

I and II of the Indictment;

6. Defendant Werme's Second Supplemental Memorandum in Support of Motion to Dismiss the Indictment for Failure to State an Offense;

7. the Government's response to Defendants' Supplemental Memoranda of Law in Support of Their Motions to Dismiss the Indictment for Failure to State an Offense; and

8. Defendant Werme's Second [sic] Supplemental Memorandum of Law in Support of Motion to Dismiss the Indictment.

In addition, since defendant Werme argued in the motion to dismiss that the indictment should be dismissed for pre-indictment delay, this Court will also consider the defendant Brault's motion to dismiss for pre-indictment delay and the government's response thereto. And finally, since the government's motion to quash subpoena of Peter Clark is inextricably intertwined with that issue, the government's motion to quash subpoena of Peter Clark will be considered with defendants' responses thereto. For the following reasons, defendants' motions to dismiss the indictment for failure to state an offense are DENIED; the government's motion to quash subpoena is GRANTED; this Court's Order dated October 10, 1989 quashing the subpoena of Peter Clark is affirmed; and defendants' motions to dismiss for pre-indictment delay are DENIED.

I. FACTUAL BACKGROUND

Defendants Russell A. Werme and Eugene L. Brault were indicted in a two-count indictment. The indictment charges that defendant Werme was the President of B & B Insulation, Inc. ("B & B"), a firm which, among other things, was involved in the installation of thermal insulation and penetration seals in nuclear power plants. Defendant Brault was an employee at B & B. Timothy W. McCuen, named as a co-conspirator in the indictment but not a defendant, was employed by United Engineers and Constructors, Inc. ("UEC"), an architect-engineering firm specializing in heavy construction projects.

In 1977, UEC became involved in managing the construction of two nuclear power plants in New England, the Seabrook 1 and Seabrook 2 plants. As part of its duties, UEC was involved in receiving confidential bids for the contract to install the penetration seals at the Seabrook 1 and 2 plants. Among the bidders was B & B.

Count I of the indictment charges that Werme and Brault, with McCuen, conspired to violate Section 1952(a)(3) of Title 18 of the United States Code. the indictment charges that the plan and purpose of the conspiracy was for Werme and Brault to pay McCuen money in order to obtain copies of the competitive confidential bids for the penetration-seals contract. With this information, B & B would be able to submit the lowest bid and, thus, be awarded the contract.

The indictment lists various overt acts involved in the conspiracy. The indictment charges that: Werme authorized and directed B & B to send $3,000 to Brault in Philadelphia so that Brault could give this money to McCuen; Brault gave this money to McCuen; Brault received and reviewed copies of the confidential bids; and, Brault submitted a bid to UEC on behalf of B & B for the Seabrook contract. These acts, the indictment charges, violated Section 371 of Title 18 of the United States Code.

Count II of the indictment charges that Werme and Brault travelled in interstate commerce with the intent to carry on an unlawful activity, viz commercial bribery, in violation of Section 4108 of Title 18 of the Criminal Law of the Commonwealth of Pennsylvania. Count II charges that Brault did perform an act of commercial bribery by paying $3,000 to McCuen to obtain the confidential bid information. These actions, Count II charges, violated Sections 1952(a)(3) and 2 of Title 18 of the United States Code.

II. DISCUSSION

Defendant Werme claims the indictment should be dismissed because count I fails to state an offense under the laws of the United States. Defendant Brault, in its supplemental memorandum of law in support of Werme's motion, argues that Count II of the indictment should also be dismissed on similar grounds. In addition, defendant Werme claims that the indictment should be dismissed for pre-indictment delay. Since defendant Brault has moved to dismiss the indictment

for pre-indictment delay in a separate motion, this Court will also consider Brault's motion to dismiss for pre-indictment delay at this time.

A. SUFFICIENCY OF INDICTMENT

1. COUNT I

Count I of the indictment charges defendants with violating Section 371 of Title 18 of the United States Code, which provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

18 U.S.C. § 371.

The underlying offense against the United States with which the defendants are charged of conspiring is to violate the Travel Act, 18 U.S.C. § 1952. The indictment specifically charges that defendants conspired to violate Section 1952(a)(3) of the Travel Act, which proscribes traveling in interstate commerce or use of any facility in interstate commerce with the intent to facilitate the promotion, management, establishment, or carrying on of any unlawful activity. 18 U.S.C. § 1952(a)(3).

"Unlawful activity" is defined in Section 1952(b) as:

> (1) [A]ny business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics or controlled substances (as defined in section 102(6) of the Controlled Substances Act), or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States, or (3) any act which is indictable under chapter 53 of title 31, United States Code, or under section 1956 or 1957 of this title.

18 U.S.C. § 1952(b).

The thrust of defendants' argument regarding count I is that the indictment is defective for failing to set forth exactly which "unlawful activity" under Section 1952(b) the defendants conspired to commit. The government responds by claiming that the offense charged in count I is a violation of Section 371 of Title 18, and that the underlying offense to this charge is a violation of Section 1952(a)(3) of the Travel Act. The government claims that since the elements of Section 371 are set forth, including which specific federal law defendants allegedly conspired to commit, the indictment need not set forth the offense underlying

the violation of Section 1952(a)(3).

Federal Rules of Criminal Procedure 7(c)(1) provides:

> The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged.

Fed.R.Crim.P. 7(c)(1).

The inquiry into whether the indictment is insufficient under Rule 7(c) focuses on whether the insufficiency is merely technical or whether it amounts to a deprivation of a significant protection afforded by the indictment process. United States v. Wander, 601 F.2d 1251, 1258 (3d Cir. 1979). "An indictment provides satisfactory protection if it fairly informs the defendant of the charge against him and enables him to plead acquittal or conviction in bar of future prosecutions for the same offense." United States v. Sebetich, 776 F.2d 412, 426 (3d Cir. 1985), reh'g denied, 828 F.2d 1020 (1987), cert. denied, 484 U.S. 1017 (1988).

A number of cases have considered whether an indictment must set forth with specificity the underlying offense to a conspiracy charge under Section 371 of Title 18 or to a charge under the Travel Act. None, however, considers whether an indictment must set forth the underlying offense to a Travel Act charge where the Travel Act Violation is the underlying offense to a conspiracy charge under Section 371 of

Title 18.[1]

The indictment in the present case sets forth the elements of a conspiracy charge under Section 371 of Title 18. The elements of such a charge are: (1) an agreement; (2) some overt act in furtherance of the objective; and (3) intent on the part of the conspirators to agree as well as to commit some offense against the United States. Cf. United States v. Rankin, 870 F.2d 109, 113 (3d Cir. 1989) (setting forth the elements for a conspiracy charge to defraud the United States under 18 U.S.C. § 371), cert. denied, 110 S.Ct. 126 (1989). The indictment sets forth these elements by asserting

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[1]The cases defendants cite for this Court are all inapposite. United States v. Miller, 774 F.2d 883 (8th Cir. 1985) (indictment is insufficient where charge under 18 U.S.C. § 1955 failed to cite the state statute allegedly violated); United States v. Hayes, 775 F.2d 1279 (4th Cir. 1985) (failure to specify what overt act in violation of state law was committed in substantive charge under the Travel Act required dismissal of count); United States v. Wander, 601 F.2d 1251 (3d Cir. 1979) (failure to specify what overt act in violation of state law was committed in substantive charge under the Travel Act required dismissal of count).

This case involves a conspiracy charge, the underlying offense being a violation of 18 U.S.C. § 1952(a)(3). As discussed ahead, the essentials of this charge are plead with sufficient specificity to withstand defendants' motion.

that Werme, Brault, and McCuen agreed to violate Section 1952(a)(3) of Title 18 and that a number of overt acts were committed in the furtherance of this agreement, which violated Section 1952(a)(3) of Title 18. Thus, the defendants have been apprised of the conspiracy charge against them. In addition, defendants would be able to raise these proceedings as a bar to any future prosecution for this conspiracy.

Defendants claim that this is insufficient, however, and that the indictment must set forth the offense underlying the alleged violation of Section 1952(a)(3). This Court is unpersuaded. In Wander, the Third Circuit held that a conspiracy charge "need not allege the essential elements of the underlying offense which is the object of the conspiracy, a requirement of an indictment charging a substantive offense." Wander, 601 F.2d at 1260. As the Court in Wander quoted:

> In a conspiracy count, the conspiracy is the gist of the offense. Where, as here, the purpose of the conspiracy is the performing of acts which are made an offense by another section of the Criminal Code, every element of that offense need not be set forth. A conspiracy count need not plead the substantive offense letter-perfect because the purpose of the conspiracy may have been accomplished even though such activity fell short of completing a substantive offense.

Id. at 1259 (quoting United States v. Knox Coal Co., 347 F.2d 33, 38 (3d Cir. 1965), cert. denied, 382 U.S. 904 (1965).

Where, as here, a defendant is charged with conspiracy to violate some federal offense, the defendant is sufficiently apprised of the charge against him where the elements of the conspiracy and the underlying federal offense are set forth. The indictment here sets forth the elements of the conspiracy and the underlying offense. In addition, there can be no doubt from a plain reading of the indictment that the "unlawful activity" under the Travel Act is bribery. The indictment charges that Brault and Werme conspired to and did pay McCuen $3,000.00 to obtain confidential bids received by UEC from B & B's competitors.

Defendants correctly observe that some courts have held that one count of an indictment may not provide missing information from another count unless the other count is specifically referenced. See, e.g., United States v. Hooker, 841 F.2d 1225, 1231 (4th Cir. 1988).[2] Accordingly, defendants claim, the reference to commercial bribery under 18 Pa. C.S.A. § 4108 in count II may not supply the missing "unlawful activity" in count I. Count I charges a conspiracy to violate the Travel Act. Count II charges the actual violation of the Travel Act, by alleging commercial bribery under 18 Pa. C.S.A. § 4108. Clearly, each Count independently informs the defendants of the offenses charged.

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[2]See also United States v. Jones, No. 89-84, slip op. at 3 (W.D. Mo. Aug. 18, 1989). But see United States v. Esposito, 771 F.2d 283 (7th Cir. 1985), cert. denied, 106 S.Ct. 1187 (1986).

2. COUNT II

Count II charges that defendants travelled in interstate commerce with the intent to bribe McCuen and that Brault did in fact bribe McCuen, all in violation of 18 Pa. C.S.A. § 4108. This, the indictment charges, violated Sections 1952 (a)(3) and 2 of Title 18.[3]

Defendants challenge this count on similar grounds as to those raised against count I. Defendants claim that, by failing to specify exactly which subsection of 18 Pa. C.S.A. § 4108 is charged, defendants cannot determine the charges against them. In addition, defendants claim that, since the conduct alleged could arguably violate all three of the subsections under that section, then, "it is a distinct possibility that a majority of the grand jurors could have voted to indict the defendants on Count Two without a majority actually agreeing on which paragraph the Co-defendants, or McCuen, agreed to commit." (Defendant Brault's Supplement Memorandum of Law Supporting Motion of Werme to Dismiss the Indictment at 7.)

In addition to requiring that the indictment provide a concise and definite written statement of the essential facts of the charge, Federal Rule of Criminal Procedure 7(c) provides that the "indictment or information shall

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[3]Section 2 of Title 18 provides for accomplice liability. 18 U.S.C. § 2.

state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated." Fed.R.Crim.P. 7(c)(1). However, "[e]rror in the citation or its omission shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to the defendant's prejudice." Fed.R.Crim.P. 7(c)(3) (emphasis added). The Notes of the Advisory Committee on Rules to Rule 7(c)(3) provide that "[t]he provision of the rule, in view of the many statutes and regulations, is for the benefit of the defendant and is not intended to cause a dismissal of the indictment, but simply to provide a means by which he can be properly informed without danger to the prosecution." Fed.R.Crim.P. 7(c)(3) advisory committee note.[4]

A plain reading of Count II of the indictment clearly indicates that defendants are charged with violating section 4108(c) of the Pennsylvania Crimes Code, 18 Pa. C.S.A. § 4108(c). That section provides that "[a] person commits a misdemeanor of the second degree if he confers, or offers or agrees to confer, any benefit

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[4]See also United States v. Hutchison, 312 U.S. 219, 229 (1941) ("In order to determine whether an indictments charges an offense against the United States, designation by the pleader of the statute under which he purported to lay the charge is immaterial."); United States v. Welch, 656 F.2d 1039, 1059 n.26 (5th Cir. 1981) (noting Fed.R.Crim.P. 7(c)(3)), cert. denied, 456 U.S. 915 (1982).

the acceptance of which would be criminal under subsections (a) or (b) of this section." 18 Pa. C.S.A. § 4108(c). Subsection (a) provides that "[a]n employee, agent or fiduciary commits a misdemeanor of the second degree when, without the consent of his employer or principal, he solicits, accepts, or agrees to accept any benefit from another person upon agreement or understanding that such benefit will influence his conduct in relation to the affairs of his employer or principal." 18 Pa. C.S.A. § 4108(a). It is clear that Werme and Brault are charged with conferring on McCuen $3,000.00, a violation of section 4108(c), to influence his conduct in relation to the affairs of his employer, a violation of 4108(a).

B. PRE-INDICTMENT DELAY

Rule 48(b) of the Federal Rules of Criminal Procedure allows the court to dismiss an indictment if there was unnecessary delay in presenting the case to a grand jury. However, if charges are brought within the period specified by the statute of limitations, mere delay alone is not sufficient to warrant the dismissal of an indictment. To warrant the dismissal of an indictment on the ground of pre-indictment delay, the defendant must establish a violation of due process under the Fifth Amendment. The statute of limitations is a defendant's "primary guarantee against bringing overly stale criminal charges." United States v. Marion, 404 U.S. 307, 322 (1971); United State [sic] v. Sebetich, 776 F.2d 412, 429-30 (3d Cir. 1985), reh'g denied, 828 F.2d 1020 (1987), cert. denied, 484 U.S. 1017 (1988). The due process clause of the Fifth Amendment,

however, does protect the defendant against oppressive pre-indictment delay, even where the defendant is indicted within the applicable limitations. Sebetich, 776 F.2d at 430. This notwithstanding:

> [T]he Due Process Clause does not permit courts to abort criminal prosecutions simply because they disagree with a prosecutor's judgment as to when to seek an indictment. Judges are not free, in defining 'due process,' to impose on law enforcement officials our 'personal and private notions' of fairness and to 'disregard the limits that bind judges in their judicial function. Our task is more circumscribed. We are to determine only whether the action complained of . . . violates those 'fundamental conceptions of justice which lie at the base of our civil and political institutions' and which define 'the community's sense of fair play and decency.'

United States v. Lovasco, 431 U.S. 788, 790 (1977) (quoting Rochin v. California, 342 U.S. 165, 170 (1952); Mooney v. Holohan, 294 U.S. 103, 112 (1935) (citation omitted).

To invoke the protection of the due process clause, the defendant must prove "'that the government's delay in bringing the indictment was a deliberate device to gain an advantage over him and that it caused him actual prejudice in presenting his defense.'" Sebetich, 776 F.2d at 430 (quoting United States v. Gouveia, 476 U.S. 180, 192 (1984)); United States v. Otto, 742 F.2d

104, 107 (3d. Cir. 1984).[5] The defendant has the burden of proving both of these points. Here, the defendants have not alleged facts which show that the delay was intentional and for the purpose of gaining tactical advantage.

The indictment in this case was brought approximately four years and fifty weeks after the events alleged in the indictment took place. The statute of limitations in this matter is five years. Defendants, in an attempt to sustain the burden of showing actual prejudice, first claim that W. Scott Bell, Jr. died since

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[5]Defendants' claim that mere recklessness on the part of the government in failing to indict earlier is sufficient to dismiss the indictment for pre-indictment delay. The defendants cite for this Court United States v. Harmon, 379 F. Supp. 1349 (D.N.J. 1974). This Court declines to follow that case. The Court there rejected the proposition that dismissal is proper where the defendant shows prejudice and that the government intentionally delayed prosecution to gain some tactical advantage. It is beyond question, however, that this is now the standard in the Third Circuit. Sebetich, 776 F.2d 412, 430 (quoting United States v. Gouveia, 476 U.S. 180, (1984)).

In addition, the government need not account for the delay until the defendant has shown either prejudice or intentional delay. Otto, 742 F.2d at 108. Since defendant has failed to show either here, the government need not account for the delay.

the charged events and would have been a key defense witness. The record indicates that Bell was a chief estimator at B & B from 1971 through the times relevant to these proceedings. See Defendant's Exhibit 6, admitted at Hearing on Sept. 21, 1989. The record also indicates that Bell died on August 31, 1987. Defendant's Exhibit 7, admitted at Hearing on Sept. 21, 1989.

The defendants allege that they have suffered actual prejudice as a result of the death of an employee of B & B who would have testified at trial. The employee, according to defendants, was aware of how B & B handled so called "cost plus" contracts. The defendants, however, fail to demonstrate how the testimony to be offered by the employee who handled "cost plus" contracts is relevant to the defense. When a defendant alleges prejudice because of the loss of evidence, he must show that the loss impaired his ability to prove a meaningful defense. United States v. Solomon, 686 F.2d 836, 872 (11th Cir. 1982). See also United States v. Butler, 792 F.2d 1528, 1533 (11th Cir. 1986) ("[s]peculative allegations, such as general allegations of loss of witnesses and failure of memories, are insufficient to demonstrate the actual prejudice required").

In the case at bar, the defendants have not met their burden of showing actual prejudice. The mere allegation that an employee is not available to testify is not sufficient to warrant dismissal of the indictment. Defendants have not demonstrated that this lost testimony impairs their ability to prove a meaningful

defense.

Defendants also claim prejudice arising from the fact that one of the recorded conversations between Dr. Frank Farese, an FBI informant, and defendant Brault was recorded over. Defendants claim that this conversation would help indicate that they were the subject of a "shakedown scheme" promoted by Farese and McCuen. Defendants claim that, due to the delay in prosecution, Brault's ability to reconstruct the erased-over conversation is impaired. The Third Circuit has held, however, that mere "contentions that the memories of witnesses faded as a result of the delay falls short of the requisite showing of actual prejudice." Sebetich, 776 F.2d 412, 430 (citing Marion, 404 U.S. 307, 325-26).[6] The defendants in the instant action have failed to show any prejudice which has resulted from the government's delay.

Assistant United States Attorney, Howard P. Stewart, stated on September 21, 1989, that he became involved in this case in 1985. He stated that he and Assistant United States Attorney Peter Clark were assigned to the fraud section of the Justice Department and were working on a number of cases at the time the

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[6]Defendants' claim that the government appears to have lost or misplaced items over the period of discovery does not change this Court's holding. Defendants merely claim that this evidence does not appear to be in the government's possession. This is insufficient to dismiss the indictment.

statute of limitations in this matter was running. He stated that the reason that the indictment was not handed down earlier was because the "cases were prioritized." Transcript of Hearing on September 21, 1989 at 86. There is no reason to believe that Assistant United States Attorney Peter Clark would offer additional evidence showing an intent to gain a tactical advantage.[7]

Defendants' claim that there was sufficient evidence to indict the defendants in the summer of 1984 is not a sufficient showing to dismiss the indictment for pre-indictment delay. The Supreme Court has rejected the argument that the prosecution must proceed immediately upon having evidence to show either probable cause or guilt beyond a reasonable doubt. Lovasco, 431 U.S. at 790-97. In addition, the Third Circuit in Sebetich held that the defendant had failed to show that the delay was a deliberate tactical maneuver by the government where the delay was caused by confusion between the state and federal government as

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[7]Even if counsel for defendant Werme's proffer of testimony of Peter Clark is complete accurate as to how Clark would testify, it does not establish that the government intentionally delayed prosecution in this case for the purpose of gaining a tactical advantage. However, if Clark did testified that the government's delay in prosecuting this case was intentional and for the purpose of gaining a tactical advantage, defendants' motions would be denied for failing to prove any actual prejudice resulting from the delay.

to which would prosecute the case, and the case "'just sort of fell between the chairs.'" Sebetich, 776 F.2d at 429.

Prioritization is a fact of life in today's overburdened legal system; it does not require dismissal of a case. "[T]he Due Process Clause does not permit courts to abort criminal prosecutions simply because they disagree with a prosecutor's judgment as to when to seek an indictment." Lovasco, 431 U.S. at 790. An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
v.	:	
RUSSELL A. WERME	:	
EUGENE L. BRAULT	:	NO. 89-132

ORDER

AND NOW, this 26th day of December, 1989, upon consideration of:

1. Defendant Werme's Motion to Dismiss the Indictment;

2. the Government's response thereto;

3. Defendant Brault's Supplemental Memorandum of Law Supporting Defendant Werme's Motion to Dismiss the Indictment;

4. Defendant Brault's Submission of Additional Legal Authority in Support of Defendant's Motion to Dismiss the Indictment for Failure to State an Offense;

5. Defendant Werme's Supplemental Memorandum in Support of Motion to Dismiss Counts I and II of the Indictment;

6. Defendant Werme's Second Supplemental Memorandum in Support of Motion to Dismiss the Indictment for Failure to State an Offense;

7. the Government's response to Defendants' Supplemental Memoranda of Law in Support of Their Motions to Dismiss the Indictment for Failure to State an Offense;

8. Defendant Werme's Second [sic] Supplemental Memorandum of Law in Support of Motion to Dismiss the Indictment;

9. Defendant Brault's Motion to Dismiss for Pre-Indictment Delay;

10. the Government's response thereto;

11. the Government's Motion to Quash Subpoena of Peter Clark; and

12. Defendants' responses thereto,

IT IS HEREBY ORDERED that:

1. Defendants' motions to dismiss the indictment for failure to state an offense are DENIED;

2. the Government's motion to quash subpoena is GRANTED and this Court's Order dated October 10, 1989 quashing the subpoena of Peter Clark is affirmed; and

3. Defendants' motions to dismiss for pre-indictment delay are DENIED.

BY THE COURT:

/s/
HERBERT J. HUTTON, J.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	§	
	§	
v.	§	Case No. 89-132-01
	§	
RUSSELL A. WERME JR.	§	THEODORE W. PINSON, ESQ.
11949 Longleaf Lane	§	Attorney for
Houston, TX 77024	§	Defendant
	§	

JUDGMENT IN A CRIMINAL CASE

THE DEFENDANT ENTERED A PLEA OF: _____ as to Count(s) _____.

THERE WAS A verdict of guilty as to counts 1 and 2.

THERE WAS A judgment of acquittal as to count 2. The defendant is acquitted and discharged as to this count(s).

THE DEFENDANT IS CONVICTED OF THE OFFENSE OF Conspiracy; in violation to Title 18 U.S.C. Sec. 371.

IT IS JUDGMENT OF THIS COURT THAT: ON COUNT ONE: The defendant is committed to the custody of the Attorney General or

his authorized representative for IMPRISONMENT for a term of 3 YEARS. It is ORDERED that the imposition of this sentence is SUSPENDED and the defendant is placed on PROBATION for a period of 5 YEARS with the following special conditions

1). The defendant shall perform 300 HOURS of Community Service as directed by the Probation Department in the Southern District of Texas.

2). The Court ORDERS that the supervision of this case is TRANSFERRED to the U.S. Probation Department in the Southern District of Texas.

3). The defendant shall pay a FINE in the amount of $10,000.00, during the period of probation on a schedule to be determined by the Probation Department.

In addition to any conditions of probation imposed above, IT IS ORDERED that the conditions of probation set out on the reverse of this judgment are imposed.

CONDITIONS OF PROBATION

Where probation has been ordered the defendant shall:

(1) refrain from violation of any law (federal, state, and local) and get in touch immediately with your probation officer if arrested or questioned by a law-enforcement officer;
(2) associate only with law-abiding persons and maintain reasonable hours;
(3) work regularly at a lawful occupation and support

legal dependents, if any, to the best of your ability. (When out of work notify your probation officer at once, and consult him prior to job changes);
(4) not leave the judicial district without permission of the probation officer;
(5) notify your probation officer immediately of any changes in your place of residence;
(6) follow the probation officer's instructions and report as directed.

The court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within the maximum probation period of 5 years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

IT IS FURTHER ORDERED that the defendant shall pay a total special assessment of $_____ pursuant to Title 18, U.S.C. Section 3013 for count(s) as follows:

IT IS FURTHER ORDERED THAT counts _____ are DISMISSED on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall pay to the United States attorney for this district any amount imposed as fine, restitution or special assessment. The defendant shall pay to the clerk of the court any amount imposed as a cost of prosecution. Until all fines, restitution, special assessments and costs

are fully paid, the defendant shall immediately notify the United States attorney for this district of any change in name and address.

IT IS FURTHER ORDERED that the clerk of the court deliver a certified copy of this judgment to the United States marshal of this district.

JUNE 20, 1990
Date of Imposition of Sentence
/s/
Signature of Judicial Officer

HERBERT J. HUTTON, U.S.D.J.
Name and Title of Judicial Officer

June 21, 1990

RETURN

I have executed this Judgment as follows:

_____

Defendant delivered on [date] to _____
at _____,
the institution designated by the Attorney General, with a certified copy of this Judgment in a Criminal Case.

_____
United States Marshal

By_____
Deputy Marshal

A TRUE COPY CERTIFIED TO AND FROM THE RECORD
DATED: June 22, 1990
ATTEST: /s/ Michelle Butler
Deputy Clerk, United States District Court
Eastern District of Pennsylvania

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CRIMINAL NO. 89-001332
v.	:	DATE FILED: _____
RUSSELL A. WERME EUGENE L. BRAULT	:	VIOLATIONS: 18 U.S.C. § 371 (Conspiracy - 1 Count) 18 U.S.C. § 1952(a)(3) (Interstate travel in aid of racketeering--1 Count) 18 U.S.C. § 2 (Aiding and abetting)

SUPERSEDING INDICTMENT

COUNT ONE

THE GRAND JURY CHARGES THAT:

At all times material to this Indictment:

1. United Engineers and Constructors, Inc. (United Engineers) was a Delaware corporation with offices at 30 South 17th Street, Philadelphia, Pennsylvania. United Engineers was an architect-engineering firm which specialized in heavy construction projects.

2. B&B Insulation, Inc. (B&B) was a Texas corporation with offices in Houston, Texas. B&B was engaged in, among other things, the marketing and installation of thermal insulation and penetration seals in nuclear power generation plants.

3. Defendant RUSSELL A. WERME was president of B&B.

4. Defendant EUGENE L. BRAULT was employed by B&B.

5. Timothy W. McCuen, named herein as co-conspirator but not as a defendant, was employed by United Engineers as Group Chief Purchasing Agent.

6. In or about 1977, United Engineers was retained by a consortium of New England public utility companies to manage the construction of two nuclear power generation plants, known as "Seabrook 1" and "Seabrook 2", to be located in Seabrook, New Hampshire.

7. As part of its duties to manage the construction of the Seabrook 1 and Seabrook 2 project, United Engineers did, among other things, receive confidential bids submitted by firms competing for the award of the contract to furnish and install penetration seals at Seabrook 1 and Seabrook 2 (hereinafter referred to as the "Seabrook contract"), then under construction. Among the firms invited to bid for the Seabrook contract were Tech-Sil, Inc., Bisco, Inc., and B&B.

8. Beginning at a time unknown to the grand jury but continuing from at least January 1983 to and including April 19, 1984, in the Eastern District of Pennsylvania and elsewhere, the defendants,

RUSSELL A. WERME and
EUGENE A. BRAULT,

together with Timothy W. McCuen and other persons known and unknown to the grand jury, did conspire, combine, confederate and agreed to violate Title 18, United States Code, Section 1952(a)(3).

PLAN AND PURPOSE OF THE CONSPIRACY

9. It was the plan and purpose of the conspiracy that defendants RUSSELL A. WERME and EUGENE L. BRAULT on behalf of B&B, would and did obtain copies of bids containing confidential information, received by United Engineers from the competitors of B&B on the Seabrook contract. Defendants RUSSELL A. WERME and EUGENE L. BRAULT would and did obtain copies of bids received by United Engineers from the competitors of B&B prior to the time B&B actually submitted its bid to United Engineers.

10. It was further the plan and purpose of the conspiracy that defendants RUSSELL A. WERME and EUGENE L. BRAULT would and did confer on Timothy W. McCuen, money and other things of value in exchange for copies of the bids received from competitors of B&B by United Engineers for the

Seabrook contract.

11. It was further the plan and purpose of the conspiracy that defendants RUSSELL A. WERME and EUGENE L. BRAULT on behalf of B&B, would and did review and utilize the confidential information contained in the bids received from the competitors of B&B by United Engineers in preparing the bid to be submitted to United Engineers by B&B, thereby assuring that B&B would submit the lowest bid for the Seabrook contract and unlawfully receive the Seabrook contract from United Engineers.

OVERT ACTS

12. In furtherance of the plan and purpose of the conspiracy defendants RUSSELL A. WERME and EUGENE L. BRAULT, and their co-conspirators did do and perform the following overt acts in the Eastern District of Pennsylvania and elsewhere:

(a) On or about July 29, 1983, defendant RUSSELL A. WERME did travel interstate from Houston, Texas to Philadelphia, Pennsylvania and obtain copies of the bids received by United Engineers from the competitors of B&B.

(b) On or about July 29, 1983, defendant RUSSELL A. WERME did make a telephone call from Philadelphia to defendant EUGENE L. BRAULT in Houston, Texas and direct EUGENE L. BRAULT to travel from Houston to Philadelphia.

(c) On or about July 30, 1983, defendant EUGENE L. BRAULT did travel interstate from Houston, Texas to Philadelphia, Pennsylvania to assist in the preparation of the bid to be submitted by B&B to United Engineers.

(d) On or about September 1, 1983, defendant EUGENE L. BRAULT, together with another employee of B&B, did travel interstate from Houston, Texas to Philadelphia, Pennsylvania.

(e) On or about September 1, 1983, defendant EUGENE L. BRAULT did receive and review a copy of confidential information received by United Engineers from Bisco, Inc., a competitor of B&B.

(f) On or about September 1, 1983, defendant EUGENE L. BRAULT and the other employee of B&B did review and utilize the confidential information received by United Engineers from Bisco, Inc. to prepare the bid to be submitted to United Engineers by B&B.

(g) On or about April 18, 1984, defendant EUGENE L. BRAULT did rent two rooms at the Holiday Inn, 18th and Market Street in Philadelphia, Pennsylvania.

(h) On or about April 18, 1984, defendant RUSSELL A. WERME did authorize and direct an employee of B&B to send, via Western Union, $3,000 to the defendant, EUGENE L. BRAULT, in Philadelphia, Pennsylvania.

(i) On or about April 18, 1984, defendant EUGENE L. BRAULT did receive from B&B $3,000 in U. S. currency at the Western Union office, 230 South 11th Street in Philadelphia, Pennsylvania.

(j) On or about April 18, 1984, defendant EUGENE L. BRAULT did, by pre-arrangement, place the $3,000, received from B&B, in an envelope and place said envelope in room 1615 at the Holiday Inn, 18th and Market Street in Philadelphia, Pennsylvania.

(k) On or about April 18, 1984, defendant EUGENE L. BRAULT did park a rented car in a commercial garage at 18th and Market Street in Philadelphia, and place the key to room 1615 in the Holiday Inn, 18th and Market Street in Philadelphia, inside the rented car.

(l) On or about April 18, 1984, defendant EUGENE L. BRAULT did remove from room 1615 in the Holiday Inn, 18th and Market Street in Philadelphia copies of confidential bids received by United Engineers from competitors of B&B.

(m) On or about April 18, 1984, defendant EUGENE L. BRAULT did review and utilize the confidential bid received by United Engineers from competitors of B&B to prepare the bid to be submitted to United Engineers by B&B.

(n) On or about April 18, 1984, defendant EUGENE L. BRAULT did submit to United Engineers

a bid on behalf of B&B for the Seabrook contract.

All in violation of Title 18, United States Code, Section 371.

COUNT TWO

THE GRAND JURY FURTHER CHARGES THAT:

13. Paragraphs 1 through 7 and 12(g)-(n) of Count One are hereby realleged and incorporated herein as if set forth in full.

14. On or about April 18, 1984, in the Eastern District of Pennsylvania and elsewhere, defendants

RUSSELL A. WERME and
EUGENE L. BRAULT

did travel and did cause travel in interstate commerce, from Houston, Texas to Philadelphia, Pennsylvania with intent to promote, facilitate and carry on an unlawful activity; that is commercial bribery, in violation of Section 4108 of Title 18 of the Criminal Law of the Commonwealth of Pennsylvania, and thereafter defendant EUGENE L. BRAULT did perform and attempt to perform an act of commercial bribery, that is, he paid Timothy W. McCuen, an employee of United Engineers, $3,000, without the consent or knowledge of Timothy W. McCuen's employer, with intent to influence unlawfully the conduct of Timothy W. McCuen in the performance of his duties and the affairs of United Engineers, that is, to furnish to

representatives of B&B copies of confidential bids received by United Engineers from competitors of B&B.

All in violation of Title 18, United States Code, Sections 1952(a)(3) and 2.

A TRUE BILL:

_____
FOREPERSON

/s/ Thomas H. Lee for
MICHAEL M. BAYLSON
United States Attorney

FILED
JAN 29 1992
OFFICE OF THE CLERK

(3)

No. 91-888

In the Supreme Court of the United States

OCTOBER TERM, 1991

RUSSELL A. WERME, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
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QUESTION PRESENTED

Whether the court of appeals correctly held that the indictment charging petitioner with conspiring to violate the Travel Act set forth a sufficient description of the crime petitioner was charged with committing.

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RUSSELL A. WERME, PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-22) is reported at 939 F.2d 108.

JURISDICTION

The judgment of the court of appeals was entered on July 30, 1991. A petition for rehearing was denied on August 27, 1991. The petition for a writ of certiorari was filed on November 25, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted on one count of conspiracy, in

violation of 18 U.S.C. 371, and one count of violating the Travel Act, 18 U.S.C. 1952(a)(3). The district court subsequently granted a judgment of acquittal on the substantive count. See Pet. App. 45. Petitioner was given a suspended sentence of three years' imprisonment and five years' probation on the conspiracy count. *Id.* at 4.

The evidence at trial showed that United Engineers and Constructors, which is based in Philadelphia, was the prime contractor on the Seabrook Nuclear Power Plant construction project in New Hampshire. Petitioner was the president of a company with a Texas subsidiary that sought to be a subcontractor on the project. On four different occasions, petitioner paid the prime contractor's Chief Buyer for confidential information relating to competing bids to install insulation at the plant. Pet. App. 2-4.

On appeal, petitioner argued that the count charging him with conspiring to violate the Travel Act was insufficient. The court of appeals rejected that claim. Pet. App. 5-10. The court noted that when reviewing the sufficiency of an indictment, it looks at the entire instrument to determine "(1) whether the indictment contains the elements of the offense intended to be charged and sufficiently appraises [*sic*] the defendant of [the crime] he should be prepared to meet; [and] (2) whether the indictment is specific enough to make a plea of double jeopardy possible." *Id.* at 6, quoting *United States* v. *Wander*, 601 F.2d 1251, 1258 (3d Cir. 1979). The court added that an indictment charging a conspiracy under 18 U.S.C. 371 need not specifically plead all of the elements of the underlying substantive offense. The court explained that "[i]n a conspiracy count, the conspiracy is the gist of the offense . . . [and the indictment] need not plead the

substantive offense letter-perfect because the purpose of the conspiracy may have been accomplished even though such activity fell short of completing a substantive offense." Pet. App. 7. The indictment at issue was sufficient, the court held, to put petitioner on notice of the offense charged and to provide him with double jeopardy protection. *Id.* at 9-10.

ARGUMENT

Petitioner concedes, Pet. 7, that the court of appeals stated the correct legal test for determining the sufficiency of the indictment, but quarrels with the application of that standard in this case. That fact-bound claim does not warrant review by this Court.

This Court has long held that "an indictment is sufficient if it, first, contains the elements of the offense charged and fairly informs the defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense." *United States* v. *Bailey*, 444 U.S. 394, 414 (1980), quoting *Hamling* v. *United States*, 418 U.S. 87, 117 (1974). See *Russell* v. *United States*, 369 U.S. 749, 736-764 (1962); *United States* v. *Debrow*, 346 U.S. 374, 376 (1953); *Hagner* v. *United States*, 285 U.S. 427, 431 (1932).

In a conspiracy count the elements of the underlying substantive offense need not be pleaded with the specificity required when the charge is the actual commission of the substantive offense. This Court long ago stated that "[i]t is well settled that in an indictment for conspiring to commit an offense—in which the conspiracy is the gist of the crime—it is not necessary to allege with technical precision all the elements essential to the commission of the offense which

is the object of the conspiracy * * * or to state such object with the detail which would be required in an indictment for committing the substantive offense." *Wong Tai* v. *United States*, 273 U.S. 77, 81 (1927); *Williamson* v. *United States*, 207 U.S. 425, 447 (1908) (where an indictment alleges conspiracy, "certainty, to a common intent, sufficient to identify the offense which the defendants conspired to commit, is all that is required in stating the object of the conspiracy"). Accord *United States* v. *Reynolds*, 762 F.2d 489, 494 (6th Cir. 1985) (charging conspiracy to commit mail fraud); *United States* v. *Perkins*, 748 F.2d 1519, 1524-1525 (11th Cir. 1984) (charging conspiracy to obstruct justice); *United States* v. *Graves*, 669 F.2d 964, 968 (5th Cir. 1982) (charging conspiracy to violate the Dyer Act); *United States* v. *Clark*, 649 F.2d 534, 539 (7th Cir. 1981) (charging conspiracy to commit mail fraud). That is because "[t]he gist of the offense of conspiracy" is not the commission of the elements of the underlying offense, but rather the "agreement among the conspirators to commit an offense attended by an act of one or more of the conspirators to effect the object of the conspiracy." *United States* v. *Falcone*, 311 U.S. 205, 210 (1940). And the jury in a conspiracy case is not required to find the elements of the underlying substantive offense. The jury must simply find a "conspiracy, agreement, or understanding" to commit that substantive offense, along with an overt act. See 2. E. Devitt & C. Blackmar, *Federal Jury Practice and Instructions (Criminal)* § 28.03 (4th ed. 1990).

The indictment in this case was more than sufficient under those standards. It described a conspiracy "from at least January 1983 to and including April 19, 1984," in "the Eastern District of Pennsylvania

and elsewhere," to violate Section 1952(a)(3) by obtaining "bids containing confidential information" from competitors on the Seabrook project in return for "money and other things of value" paid to the prime contractor's Chief Buyer. Pet. App. 52. It was further alleged that petitioner and his co-defendant intended to use the confidential bid information to prepare the subsidiary's bid, assuring that the subsidiary would unlawfully obtain the subcontract to do the insulation work. *Id.* at 53. The indictment also alleged, as overt acts, that petitioner and his co-defendant traveled in interstate commerce on various occasions to obtain copies of bids received by the prime contractor from the subsidiary's competitors. *Id.* at 53-54.

The indictment thus alleged the elements of a violation of Section 371, *i.e.*, petitioner's knowing and deliberate participation in an agreement to commit an offense against the United States, and the commission of overt acts in furtherance of the agreement. Furthermore, the scope and duration of the conspiracy were clearly set forth in the indictment, thus informing petitioner of the charges against him and putting him in a position to plead double jeopardy as a bar to further prosecution for the same offense. The indictment not only described the nature of the agreement, but specified three actual instances of interstate travel in furtherance of that agreement. See Pet. App. 53-54.

Petitioner disagrees, Pet. 15, with the court of appeals' conclusion that "the paragraphs set forth in the Plan and Purpose section of the conspiracy count * * * clearly reveal that [petitioner] is charged with conspiracy to promote *commercial bribery* through interstate activity," Pet. App. 8 n.1. Contrary to petitioner's allegation, those three paragraphs, fairly

read, set forth the charge. Although the paragraphs do not include "the words 'bribe', 'commercial bribery', 'interstate', 'travel', or 'use of interstate facilities'," Pet. 15, they plainly allege that petitioner, on behalf of a Texas subsidiary, obtained confidential bids from a Pennsylvania contractor concerning a project in New Hampshire by making payments to the contractor's Chief Buyer, and that the purpose of the scheme was to obtain a subcontract unlawfully.

Petitioner claims that the indictment would be sufficient if the allegations of interstate travel that are alleged as overt acts in paragraph 12 of the indictment had been included in the prior section describing the plan and purpose of the conspiracy, but he contends that his conviction must be reversed because they were not. Pet. 16. We agree with the court of appeals that the plan and purpose section of the indictment adequately set out the essence of the conspiracy charge. But reversal of petitioner's conviction would not be warranted in any event; even if the allegations of interstate travel that were included as overt acts should have been set out in the plan and purpose section of the indictment, petitioner could not have been prejudiced by that technical pleading error.

Review is not warranted on account of petitioner's claims of a conflict in the circuits. Petitioner cites three cases in support of his contention that the allegations in the overt acts paragraph of an indictment may not be used to remedy an insufficiency in the charging section. Pet. 16. In each of those cases, however, the court of appeals affirmed the conspiracy conviction at issue. *United States* v. *Wander*, 601 F.2d 1251, 1259-1260 (3d Cir. 1979); *United States* v. *Pheaster*, 544 F.2d 353, 359-363 (9th Cir. 1976), cert. denied, 429 U.S. 1099 (1977); *United States* v.

Knox Coal Co., 347 F.2d 33, 37-39 (3d Cir.), cert. denied, 382 U.S. 904 (1965). Moreover, two of those cases, like this case, were decided by the Third Circuit. In addition, the case that petitioner claims, Pet. 19, to be "absolutely indistinguishable" from this case, *United States* v. *Hooker*, 841 F.2d 1225 (4th Cir. 1988), is distinguishable on the ground given by the court of appeals, Pet. App. 9 n.2. The indictment in *Hooker* failed even to allude to the requirement that a RICO enterprise have an effect on interstate commerce. But the indictment in this case described the interstate nature of petitioner's conspiracy, both in the plan and purpose section of the indictment and in the overt acts section. Review by this Court is therefore unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1992

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